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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, et al.,)
Plaintiffs,)
-vs-) No. 51464
ROGERS C. B. MORTON, et al.,) MEMORANDUM OF DECISION
Defendants.)

This is an action brought by the Sierra Club and others to restrain the commercial development of the so-called Mineral King area in Sequoia National Forest by Walt Disney Productions, Inc., which proposes to construct and maintain a recreational complex there under permits granted by the Forest Service of the Department of Agriculture. Plaintiffs also seek to enjoin the issuance of permits by the National Park Service of the Department of the Interior for the construction of a highway through the Sequoia National Park to the Disney complex.

On July 23, 1969, this court granted the plaintiffs a preliminary injunction in this action. An appeal followed and on September 16, 1970, the Court of Appeals reversed, holding (1) that the Sierra Club had no standing to bring the action, and (2) that plaintiffs were not likely to prevail on the merits.

1 An appeal from that decision was then taken and
2 on April 17, 1972, the Supreme Court affirmed the Court of
3 Appeals' decision that plaintiffs had not alleged sufficient
4 injury to have standing to sue.

5 This court has subsequently allowed plaintiffs
6 to amend their complaint to make further allegations concern-
7 ing standing; and, to add certain additional parties; and,
8 also, to add a third claim for relief under the National
9 Environmental Policy Act (NEPA).

10 Defendants now move to dismiss the amended com-
11 plaint under Rule 12(b)(6) of the Federal Rules of Civil
12 Procedure.

13 THE LAW OF THE CASE ISSUE

14 Defendants move to dismiss the first and second
15 causes of action upon the ground that the Court of Appeals,
16 discussing its reasons for holding that a preliminary
17 injunction should have been denied for lack of plaintiffs'
18 likelihood of prevailing on those claims, has established
19 the "law of the case" adversely to plaintiffs.

20 It is, however, a well-established general rule
21 that the decision of a trial court or an appellate court,
22 granting or denying a preliminary injunction, does not so
23 establish the "law of the case" as to estop either the
24 parties or the court from proceeding with the case on its
25 merits. 7 Moore, Federal Practice (2d ed.) ¶ 65.21 at
26 p. 1703; Benson Hotel v. Woods, 168 F.2d 694, 697 (8th Cir.
27 1948); accord, Ross Whitney Corp. v. Smith, 206 F.2d 190,
28 199 (9th Cir. 1953).

29 Although the Court of Appeals opinion expresses
30 the views of that court concerning plaintiffs' claims, it
31 does so in the context of deciding whether plaintiff has
32 shown such a likelihood of eventually prevailing as to

1 warrant issuance of a preliminary injunction, expressly
2 recognizing "that in appraising these issues, even upon a
3 preliminary basis, our function is not to make an original
4 judgment or to make a final decision on the merits." (433
5 F.2d at 33-34). 1/

6 We conclude, therefore, that notwithstanding the
7 Court of Appeals' "handwriting on the wall," plaintiffs
8 still have their right to proceed on the merits.

9 Defendants also move to dismiss plaintiffs' new
10 third cause of action, alleged failure of defendants to
11 comply with the requirements of 42 U.S.C. § 4332(C)(D) (NEPA)
12 for filing certain statements and making certain studies
13 concerning the environmental impact of the proposed project.

14 Defendants contend that plaintiffs have failed
15 to state a claim under NEPA because there is no allegation
16 that defendants have commenced construction or issued permits
17 for the project. Plaintiffs, however, alleging in their
18 complaint that defendants, having solicited bids and having
19 issued certain preliminary survey permits, have at least
20 approved the proposed project, contend that NEPA requires
21 compliance with its provisions as soon as the Government
22 agency has reached a decision to proceed with the project,
23 citing Calvert Cliffs Coordinating Committee v. AEC, 449
24 F.2d 1109 (D.C.Cir., 1971); Guidelines of the
25 President's Council on Environmental Quality, 36 Fed.Reg. 727
26 (April 23, 1971).

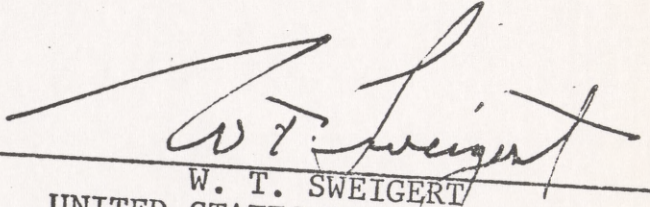
27 We conclude that plaintiffs' complaint is suffi-
28 cient to raise the issue of defendants' compliance with
29

30 1/ It should be noted that neither did this District Court in
31 its ruling on preliminary injunction presume to rule on the
32 merits - only that "plaintiff has raised questions concerning
possible excess of statutory authority, sufficiently substan-
tial and serious to justify a preliminary injunction pending
trial of these issues on the merits or the further order of
this court." (See Memorandum of Decision 7/23/69, District
Court No. 51464, p. 13).

1 NEPA. Further, defendants acknowledge their obligation to
2 comply with all provisions of NEPA before proceeding
3 further with the project (see Government's memorandum in
4 opposition to plaintiffs' motion to amend the complaint,
5 filed June 22, 1972, at p. 7).
6

7 For the foregoing reasons defendants' motion to
8 dismiss the amended complaint should be, and the same is
9 hereby, denied.

10 Dated: September 12th, 1972.
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W. T. SWEIGERT
UNITED STATES DISTRICT JUDGE